

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CACR06-9

SEPTEMBER 27, 2006

ROOSEVELT WASHINGTON JR.
APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR2004-4811]

V.

HON. JOHN LANGSTON, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant Roosevelt Washington Jr. was convicted in a bench trial in the Pulaski County Circuit Court on one count of possession of marijuana with intent to deliver. On appeal Washington contends that the trial court erred in denying his motion to dismiss because the State failed to introduce substantial evidence of the crime. The State responds that Washington's challenge to the sufficiency of the evidence is not preserved for appellate review because his motion to dismiss was untimely. We agree that the challenge is not preserved; therefore, the conviction is affirmed.

Sergeant Anthony Neff, Officer Chris Gardner, and Officer Jeff Glover of the North Little Rock Police Department testified that the following events occurred on October 10, 2004. Sgt. Neff observed a broken rear window in the car that Washington was driving,

leading Neff to suspect that it might have been stolen. Neff attempted to stop the car by activating his blue lights and siren. Washington initially evaded him by accelerating, making quick right turns, and going sideways, almost striking another vehicle. Neff caught up with Washington and pulled him over. Neff drew his weapon, got Washington out of the vehicle, handcuffed him on the ground, and learned that he was driving on a suspended driver's license.

When Officer Gardner arrived to assist, Washington and his passenger both had been taken into custody and the driver's door of Washington's car was open. Gardner saw two bags lying "along the carpeted area between the door and the driver's seat," one containing what he suspected was cocaine and the other containing seven smaller bags of suspected marijuana.

At the police substation Washington waived his Miranda rights. Officer Glover testified regarding a statement by Washington: "[H]e told me that the marijuana did belong to him. I questioned him at that time about his intent to sell because of the packing I'm sure. And he told me that he did sell marijuana, \$150 to \$200 a week to support his own habit of smoking marijuana." An analysis by the state crime laboratory confirmed that the substance in the seven smaller bags was marijuana, which had a total weight of 22.2 grams.

The record reflects the following, which transpired when the State's last witness completed his testimony:

THE COURT: You may be excused, sir.

(THEREUPON, the witness was excused)

MRS. PANASUIK: State rests, Your Honor.

THE COURT: Defense ready?

MRS. KIEL: Your Honor, may I have moment, please?

THE COURT: Yes, ma'am.

[PAUSE IN PROCEEDINGS]

MRS. KIEL: Your Honor, at this time the Defense rests.

THE COURT: Any statements of counsel?

MRS. PANASUIK: Your Honor, State would ask for the Court to find this defendant guilty of possession of controlled substance with intent to deliver. In this case we have seven individually packaged baggies of marijuana which [sic] the Court has the findings. I believe it was 22 grams of marijuana.

Also, this Defendant gave a statement admitting that the marijuana was his and also that he sold marijuana on a weekly basis. So, the State would ask for him to be found guilty of that charge.

MRS. KIEL: Your Honor, we would ask that in our Motion to Dismiss first, there have been no *Mings* factors linking the Defendant to this pot or marijuana.

Defense counsel made further arguments on his motion to dismiss, the State responded, and the court denied the motion. The trial court then inquired, "Is there anything further as to the merits?" Both parties replied in the negative. The court presented its summary of the evidence and pronounced Washington guilty as charged.

In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. Ark. R. Crim. P. 33.1(b) (2006). Pursuant to Rule 33.1(c), a defendant's failure to make a timely motion for dismissal constitutes a waiver of any question pertaining to the sufficiency of the evidence. In *J.R. v. State*, 73 Ark. App. 194, 40 S.W.3d 342 (2001), we held that a motion for dismissal was untimely and not preserved for appellate review where it was made as part of and during closing arguments, after the State gave its closing argument.

Here, as in *J.R. v. State*, *supra*, Washington's motion for dismissal was made as part of and during closing arguments by the defense, after the State gave its closing argument. After the defense rested and trial court asked for any closing remarks, the State presented closing remarks that Washington was guilty of possession of controlled substance with intent to deliver, noting particularly the seven individually packaged baggies of marijuana and Washington's statements about selling marijuana. The defense immediately presented arguments regarding his motion to dismiss, but it was too late to preserve this point for appellate review. Therefore, the conviction is affirmed.

Affirmed.

PITTMAN, C.J., and NEAL, J., agree.